

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE GLORIA M. NAVARRO, DISTRICT JUDGE  
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4 UNITED STATES OF AMERICA, :  
5 :  
6 Plaintiff, : No. 2:16-cr-100-GMN-CWH  
7 :  
8 -vs- : October 9, 2018  
9 :  
10 JAN ROUVEN FUECHTENER, : Las Vegas, Nevada  
11 :  
12 Defendant. :  
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TRANSCRIPT OF MOTION HEARING

APPEARANCES:

FOR THE PLAINTIFF: ELHAM ROOHANI  
Assistant United States Attorney  
Las Vegas, Nevada

FOR THE DEFENDANT: RICHARD SCHONFELD and  
ROBERT DeMARCO  
Attorneys at Law  
Las Vegas, Nevada

Transcribed by: Margaret E. Griener, CCR #3, FCRR  
Official Reporter  
400 South Virginia Street  
Reno, Nevada 89501

1 LAS VEGAS, NEVADA, TUESDAY, OCTOBER 9, 2018, 2:51 P.M.

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3  
4 THE CLERK: This is the time set for the motion  
5 hearing regarding document number 296, the motion for  
6 reconsideration of order number 295, in case  
7 2:16-cr-100-GMN-CWH, United States of America versus Jan  
8 Rouven Fuechtener.

9 Counsel, please make your appearances for the  
10 record.

11 MS. ROOHANI: Good afternoon, your Honor. Eli  
12 Roohani for the United States.

13 THE COURT: Good afternoon, Ms. Roohani.

14 MR. SCHONFELD: Good afternoon, your Honor.  
15 Richard Schonfeld and Robert DeMarco specially appearing for  
16 the defendant who is present in custody.

17 THE COURT: Good afternoon. So what is  
18 specially appearing?

19 MR. SCHONFELD: Your Honor, we filed the motion  
20 for release of funds for the purpose of retaining our office  
21 to represent the defendant as outlined in that motion, but  
22 until we actually -- until he has the ability to retain us as  
23 counsel, we were not and still are not in a position to make a  
24 full general appearance on his behalf.

25 THE COURT: And is Ms. Connolly present today?

1 MS. ROOHANI: Your Honor, Ms. Connolly is not  
2 present. I spoke with her yesterday. She had indicated to me  
3 that she, one, was not able to appear today, she had a hearing  
4 in family court at 2:15 p.m.

5 She also felt it would not be appropriate for  
6 her to appear here in light of the proceedings that have  
7 occurred thus far, as well as the fact that this is not her  
8 motion, and she has no position on it, and doesn't feel like  
9 she can have a position on it.

10 And so it's my understanding that she is not  
11 intending to appear today.

12 THE COURT: And, Mr. Fuechtener, do you want me  
13 to waive the appearance of your attorney, Ms. Connolly, or do  
14 you want me to continue this for a different date so that  
15 Ms. Connolly can be here? Because I was not aware that she  
16 had a conflict.

17 THE DEFENDANT: It would be okay for me to waive  
18 her appearance.

19 THE COURT: Okay. All right.

20 Well, so the motion that's made by the law firm  
21 of Chesnoff & Schonfeld refers to the Supreme Court case --  
22 I'm starting at the bottom of my list of questions instead of  
23 at the top -- *Luis v U.S.*, but the question in that case was  
24 whether a pretrial restraint of funds was appropriate.

25 We didn't have that here. Mr. Fuechtener had

1 access to his funds pretrial, and he hired various different  
2 attorneys before and during trial.

3 And it was not until after he entered a plea of  
4 guilty, and the Court accepted his plea of guilty, that as a  
5 result of him agreeing in that plea of guilty to the amount  
6 that was going to be forfeited, that the government moved for  
7 that amount to be seized in order to preserve it so that it  
8 wouldn't be spent or wasted, and the Court did grant that  
9 motion.

10 So I'm not sure that the *Luis* case really  
11 applies at all to this situation. It seems to be just the  
12 opposite.

13 But the defense also states that it looks like  
14 at this point there's only 14 of the -- there was like 90  
15 something potential victims that have actually come forward  
16 with a formal restitution request.

17 You know, the sentencing statutes provide them  
18 up to 60 days after sentencing to come forward,  
19 and specifically in these kind of cases, unfortunately what  
20 happens is a lot of these victims, they receive letter after  
21 letter after letter after letter advising them under the laws  
22 because they're required to be notified every time that their  
23 images are found by law enforcement, and it takes quite awhile  
24 for them to go through these.

25 Some of the victims who appear quite regularly

1 have retained attorneys who have staff that go through those  
2 envelopes that they receive multiple a month, and some people  
3 just don't.

4 So I don't know who these victims are  
5 specifically, and whether they're the kind of person who would  
6 only receive one envelope a year or if it's the kind of  
7 victim -- I'm thinking of, like, the Vickie and Amys that  
8 receive several, and it takes their staff months to go  
9 through.

10 And yet this case has been around for quite some  
11 time, since 2016, and has received some notoriety because of  
12 Mr. Fuechtener's professional employment and celebrity status.

13 So the amount that the defense claims for -- is  
14 likely for potential restitution at this point, if the number  
15 remains at 14 victims, times 5,000, because that's what was  
16 agreed to in the plea agreement, is the 70,000, the potential  
17 assessments is 10,200, and then the statutory fines, potential  
18 statutory fines, the maximum is 500,000.

19 MS. ROOHANI: And, your Honor, I actually do  
20 need to correct that. The mandatory restitution under the  
21 Justice for Victims of Trafficking Act is \$15,000 because he  
22 pled guilty to three counts.

23 I understand that there is a second motion to  
24 withdraw the guilty plea on the basis that the counts are  
25 duplicative. Of course, it's the government's position that

1 they are not duplicative.

2 So it's our position that the amount under the  
3 JVCA, Justice for Victims of Trafficking Act, is \$15,000 plus  
4 \$300 of the special assessment. The statutory fine range is  
5 \$750,000 for the three counts, but the guidelines range is  
6 50,000 to \$500,000.

7 And so because the government was not intending  
8 to ask for the statutory maximum amount for the purposes of  
9 the fine, that's why we limited it to 500,000 which would be  
10 the potential high end of the guideline range.

11 So that is why the amount was five -- requested  
12 was \$500,000 and not \$750,000, and a certain amount of money  
13 was returned to Mr. Fuechtener as a result of that.

14 And I recognize that we have a difference of  
15 opinion, let's say, with the defense regarding those amounts.  
16 However, based upon the existence of the current plea  
17 agreement without your Honor's ruling on the second motion to  
18 withdraw the guilty plea, that is how it stands currently.

19 Your Honor, and I believe you are absolutely  
20 correct. There are 92 identified victims. Your Honor is  
21 correct that they are entitled to continue to seek restitution  
22 up through sentencing and statutorily even after sentencing  
23 for a certain period of time.

24 I can represent to your Honor from the time the  
25 original PSR was written in this case back in early 2017, to

1 even the time that the second version of the PSR was written  
2 to now, we have had new victims come forward at each turn.

3 So I would submit to your Honor that it would be  
4 inappropriate to release funds that we have specifically set  
5 aside for the victims recognizing that the defendant was  
6 attempting to dissipate those funds to deprive them of what  
7 he's already agreed to pay them, and so we would ask that at a  
8 bare minimum that \$460,000 be protected for the victims.

9 Your Honor, if you're inclined to hear argument,  
10 Mr. Schonfeld and I spoke prior to the hearing. We have sort  
11 of an agreement on some things, but I don't know if you're  
12 inclined to allow me to make a record or not.

13 THE COURT: Sure.

14 MS. ROOHANI: May I approach, your Honor, the  
15 podium?

16 THE COURT: Yes.

17 MS. ROOHANI: Thank you.

18 Your Honor, in anticipation of this hearing I  
19 spoke with Mr. Schonfeld and Mr. Chesnoff. I explained to  
20 them the United States' position about the five requests that  
21 they had made.

22 So the five things that they had requested the  
23 \$300,000 for were, one, a new motion to withdraw the guilty  
24 plea, two, trial, if they were successful in the motion to  
25 withdraw the guilty plea, three, for the purposes of

1 sentencing, four, for the appeal, and, five, for a potential  
2 2255.

3 I explained to Mr. Schonfeld and Mr. Chesnoff  
4 that the case law did not support any funds being released  
5 under the Sixth Amendment for the appeal on the 2255, and I  
6 can explain that further, your Honor.

7 But also in terms of the trial, if they were  
8 successful in a motion to withdraw the guilty plea, the United  
9 States has already conceded early at the time before Judge  
10 Hoffman that if we don't have a conviction, we don't have a  
11 legal basis to retain these funds.

12 So I asked Mr. Schonfeld and Chesnoff to  
13 essentially carve out the additional amounts for the trial  
14 amount, the appeal amount, and the 2255 amount because it  
15 would be our position that although *Luis*, I agree with you,  
16 your Honor, is probably not applicable here, first of all,  
17 it's a forfeiture case, second of all, it's a pretrial  
18 restraint of untainted funds, and I'll go through that in just  
19 a moment.

20 They graciously came back with a number, and  
21 they told us \$175,000, but they could not assure me that that  
22 did not include an amount for appeal.

23 And so I did a little bit of research, your  
24 Honor. In *United States versus Marshall*, in 2017, the Fourth  
25 Circuit specifically held or explained that the Supreme Court



1 has never held the defendants enjoy the right to counsel of  
2 choice on appeal, and that's because defendants have no  
3 federal constitutional right to an appeal, they only have a  
4 statutory right to an appeal, therefore the defendant can't  
5 invoke the Sixth Amendment to have funds set aside for the  
6 purposes of appeal.

7 As your Honor is also aware, defendant has no  
8 right to counsel whatsoever for the purposes of a 2255, let  
9 alone counsel of his choice, or appointed counsel.

10 So at a bare minimum those two things must be  
11 carved out. There's no legal basis to release the funds for  
12 that purpose, and, in fact, it would result in a manifest  
13 injustice to the victims and also potentially the United  
14 States and the court if we were going to be seeking money for  
15 the purpose of a fine.

16 And, your Honor, if you'll allow me to, I'm  
17 going to use the ELMO just because I made a visual aid and now  
18 I want to use it so --

19 THE COURT: Okay.

20 MS. ROOHANI: Your Honor, the original case that  
21 dealt with this was *Kaplan versus Drysdale*, it was a Supreme  
22 Court case in 1989. The money was sought for services that  
23 would be rendered through the time of sentencing.

24 In that case, it dealt with tainted assets. And  
25 I note, your Honor, that all of these cases deal with

1 forfeiture, not restitution and fines. So to some degree none  
2 of these cases are instructive, but because the defendants  
3 have cited this, this is sort of why I'm going down this train  
4 of thought.

5 Those dealt with tainted assets, and the  
6 defendant had already pled guilty pursuant to a plea  
7 agreement.

8 In that case, the law firm actually sued the  
9 United States seeking a release of the forfeited funds to be  
10 able to pay themselves back for the services that they had  
11 already rendered, and the Court had said no, there's no Sixth  
12 Amendment right to -- because it was tainted funds, the rights  
13 had already vested in the United States and it was  
14 postconviction.

15 Then we get to 2016, which is *Luis*, this is the  
16 case that the defendants have cited. In that case, as your  
17 Honor as noted, this was a pretrial restraint of untainted  
18 funds. In that case the Court held that there was, in fact, a  
19 Sixth Amendment right, and therefore the Court held -- and  
20 I'll quote the language for your Honor,

21 "The defendant has a right to use his  
22 innocent property to pay a reasonable fee for  
23 the assistance of counsel."

24 And then the Court explained the courts must  
25 determine reasonable attorney's fees under the Equal Access to

1 Justice Act, which is 28 United States Code section  
2 2412(d) (2) (A) .

3 Then, your Honor, interpreting both *Kaplan* and  
4 *Luis*, we have both the Fourth and Fifth Circuit which probably  
5 is the closest to what we have here. In both of those cases  
6 the defendants had wanted money for the purposes of their  
7 appeal. It was untainted funds much like it is here. It was  
8 postconviction after they had already pled guilty or had been  
9 convicted, and both of those courts said that there was no  
10 Sixth Amendment right.

11 Now, applying that guidance to Mr. Fuechtener's  
12 case, your Honor, you note here that the motion to withdraw  
13 the guilty plea, again, all of the assets are untainted, and  
14 the government would concede that, because they are for the  
15 basis of restitution and fines and not for the basis of  
16 forfeiture.

17 As to his first request, although it is  
18 postconviction and plea, it's not entirely clear based upon  
19 this line of cases what the result would be, same as with for  
20 the purposes of sentencing, and I'll come back to that in just  
21 a moment, your Honor.

22 In terms of trial which is what I've already  
23 indicated, is if the plea is withdrawn, then *Luis* would  
24 hypothetically control because there would be a pretrial  
25 restraint of untainted funds.

1                   With regard to the appeal, *Marshall* and *Scully*  
2 from the Fourth and Fifth Circuit would control saying that  
3 there's no Sixth Amendment right, and therefore there's no  
4 basis to release those funds, and then in terms of the 2255,  
5 there's no right to counsel at all.

6                   So we're sort of left in this question mark  
7 phase regarding the first request for the motion to withdraw  
8 and the second for the purposes of sentencing.

9                   And, your Honor, as you're aware, the United  
10 States tries to make things as clear as possible for the  
11 purposes of appeal. We certainly don't want this case to be  
12 sent back on the basis of the denial of a Sixth Amendment  
13 right to counsel.

14                   Therefore, in speaking with Mr. Schonfeld and  
15 Mr. Chesnoff, we would agree that at most \$175,000 should be  
16 released, but that has to be only for the purposes of a new  
17 motion to withdraw the guilty plea, if any, and, second, for  
18 the purposes of sentencing.

19                   My additional concern, your Honor, is for the  
20 purposes of appeal. We would ask you make specific findings  
21 under *Luis*, one, that these are untainted funds, two, that it  
22 was postconviction, and, three, we would ask that you engage  
23 in a reasonable analysis under the Equal Access to Justice  
24 Act.

25                   Now, my concern, your Honor, is a little bit of

1 sticker shock when I hear that number of 300,000 and then  
2 175,000. I'm concerned because under the EAJA it specifically  
3 states that attorney's fees shall not be awarded in excess of  
4 \$125 per hour unless the Court specifically determines that an  
5 increase in the cost of living or a special factor such as a  
6 limited availability of qualified attorneys for the  
7 proceedings involved would justify a higher fee.

8 So if your Honor would be inclined to do that,  
9 we would ask that you make specific findings and make the  
10 appellate record clear in the event that the Ninth Circuit  
11 decides to review this.

12 And, your Honor, I'm happy to answer any  
13 questions that you may have either about *Luis*, about *Kaplan* or  
14 about *Marshall*.

15 THE COURT: So the \$175,000 would be to cover  
16 the motion that is claiming double jeopardy?

17 MS. ROOHANI: I'm not sure what that motion  
18 would be, your Honor, and you would have to inquire from  
19 defense counsel about that.

20 THE COURT: All right. So potentially a new  
21 motion.

22 MS. ROOHANI: Absolutely, it would be a new  
23 motion, your Honor.

24 THE COURT: And then it would also be to cover  
25 sentencing?

1 MS. ROOHANI: And an appeal. And that's my  
2 concern is I strongly urge the Court to carve out any amount  
3 for the purposes of appeal because we are attempting to  
4 protect -- and typically, your Honor, I think this is --  
5 what's important is the United States typically wouldn't take  
6 a position, but I have some type of moral ethical obligation  
7 to the victims of the defendant's crimes to preserve as much  
8 money as humanly possible.

9 And there is entirely the possibility that we  
10 have 92 currently identified victims, but we may identify more  
11 victims of the 9,000 videos on the defendant's devices by the  
12 time of sentencing, and so that is money that should also be  
13 available to those victims because the defendant has already  
14 agreed to pay them.

15 And so, your Honor, I would ask that you, at a  
16 bare minimum, ask defense counsel whether it would just apply  
17 to the motion to withdraw and sentencing, or also appeal, and,  
18 if it would apply to appeal, to carve out the amount for  
19 appeal because he has no Sixth Amendment right to that.

20 THE COURT: And your display had a blank for  
21 whether the funds should apply to sentencing pursuant to *Luis*,  
22 but that's also not a pretrial --

23 MS. ROOHANI: Agreed, your Honor, absolutely.

24 THE COURT: Pursuant to section 3673 of  
25 Title 18, the term "found guilty" includes acceptance by a

1 court of a plea of guilty as well as adjudication by a jury.

2 MS. ROOHANI: And, your Honor, I agree with you  
3 100 percent. I just don't think that *Luis* is the right case.

4 The problem is, is that I don't know that we  
5 have the right case in our arsenal right now to sort of deal  
6 with this problem.

7 And so to the extent that the defense is relying  
8 on *Luis*, we're trying to appeal-proof this, if you will, and  
9 if you were inclined to apply *Luis*, at least *Kaplan* and really  
10 its progeny and everything that's grown out of *Kaplan*, I think  
11 that there's a question mark there, and in light of the  
12 question mark, we would submit that if you were going to apply  
13 *Luis*, that would be the correct analysis.

14 And to be clear, your Honor, I don't disagree  
15 with you. I think that you are correct. I don't think *Luis*  
16 is the right -- I don't think *Luis* helps the defendant at all,  
17 in fact, it probably helps the government more than it helps  
18 the defendant because it is a pretrial restraint in that case  
19 whereas here it's a postconviction restraint.

20 THE COURT: All right.

21 MS. ROOHANI: And, your Honor, Mr. Smith just  
22 brought me the math because I can't do it in my head. It  
23 seems \$175,000 would amount to 1400 hours of legal work at  
24 \$125 an hour, which would -- to justify that we would have to  
25 push out sentencing approximately six months, and, of course,

1 I'm not inclined to agree to that especially in light of the  
2 procedural history of this case and the fact that the United  
3 States Attorney's office has been dealing with this case since  
4 January of 2016.

5 THE COURT: All right.

6 MS. ROOHANI: With your permission, I'll sit  
7 down unless you have additional questions, your Honor, thank  
8 you.

9 THE COURT: That's good. Thank you.

10 All right. Mr. Schonfeld?

11 MR. SCHONFELD: Yes, your Honor.

12 THE COURT: I know you're not quite as  
13 acquainted with this case as I am. I have essentially heard  
14 practically the entire trial because it was not until the very  
15 last government witness testified, especially Agent Panovich  
16 who is here, that the parties decided that it was appropriate  
17 to have a plea for the Court's consideration.

18 So since then we've had multiday evidentiary  
19 hearings with multiple attorneys testifying about the  
20 intricacies of representation.

21 And I have said this looks like a little bit of  
22 a desperate move on behalf of the defendant at this point, and  
23 I'm not really persuaded by the double jeopardy argument, so I  
24 don't know what other arguments you could raise in another  
25 motion for new trial.



1           But I am going to provide some funds out of the  
2 seized funds, but only a reasonable amount, because I'm also  
3 not sure that more victims are not going to come forward. I  
4 think we will see more victims, but perhaps not to the extent  
5 that it would necessitate the Court continuing to retain all  
6 of the funds.

7           So do you have a breakdown for me about -- the  
8 175,000 is represented to be for the motion, the sentencing  
9 and the appeal.

10           MR. SCHONFELD: Here's what it is, your Honor.  
11 We were quite clear with the government and wanted to let them  
12 know that it did include the appeal, and I'll explain why.

13           So what we told them the defendant would be  
14 willing to do in order to satisfy this motion and satisfy his  
15 right to counsel of choice for purposes of the potential  
16 motion to withdraw the guilty plea and the sentencing is  
17 \$125,000 for attorney's fees and \$50,000 for costs.

18           Obviously I won't go into privileged  
19 communication, but there are a lot of costs that would be  
20 involved with preparing for sentencing in the way that we  
21 would want to prepare for a sentencing.

22           As to the fee, we advised the government that we  
23 are not in a position to agree to become counsel of record for  
24 the defendant only for purposes of a potential motion to  
25 withdraw the guilty plea and sentencing, and the basis for

1 that is that once a sentencing concludes, we have an  
2 obligation on behalf of the defendant, if he directs us to do  
3 so, to file the notice of appeal within a very short time  
4 frame. So we would have to file that notice of appeal.

5 Once we file that notice of appeal, we are then  
6 counsel of record both in the district court and in the United  
7 States Court of Appeals for the Ninth Circuit.

8 If we haven't been retained for that purpose, we  
9 would then have to file a motion to withdraw as counsel of  
10 record in both courts, hope that it gets granted, but, in the  
11 meantime, there are also deadlines that come up very quickly  
12 once the notice of appeal was filed so that we would have to  
13 do requests for transcripts, designate transcripts, and other  
14 matters related to the appeal.

15 So we are just unwilling to take on that  
16 responsibility without being retained for that purpose.

17 I understand the government's argument. I have  
18 just seen the case citations for the first time. So assuming,  
19 but not agreeing that they are correct, that defendant is not  
20 entitled to counsel of choice on appeal, I would understand  
21 where that is coming from if they're accurate, however, our  
22 office would be unwilling to take on that responsibility if we  
23 weren't retained for that purpose.

24 And so that's why we did break the fee down to  
25 the periods where we felt that we could commit as counsel of

1 record. Two out of the three commitments we would make the  
2 government agrees that the defendant would be entitled to  
3 counsel of choice, but they don't agree as to the appellate  
4 issue, but that's where it breaks down.

5 That being said, the defendant could also retain  
6 someone else if that was his choosing, and that's what the  
7 Sixth Amendment says, he has a right to counsel of choice if  
8 he has the funds to hire counsel of choice.

9 And that's the issue that we're here litigating  
10 is whether or not he is going to have the funds to hire  
11 counsel of choice, which is his right under the Sixth  
12 Amendment if he has the funds. There's no dispute that the  
13 funds were untainted, the funds were held for a potential fine  
14 and potential restitution.

15 It's my understanding of the 92 people that the  
16 government has called known victims, that the vast majority of  
17 them opt out of being notified, which I would speculate as to  
18 the reasons, that they don't want to relive this type of thing  
19 over and over. So there's certain people that just don't want  
20 to receive notice and just won't participate.

21 The government can correct me if I'm wrong, but  
22 I believe that there are 19 of the 92 that actually opt to  
23 receive notice. There are 14 that I understand so far that  
24 have made a claim out of that 19. So the number is not going  
25 to be near where the government believes it's going to be.

1           The government also alluded to the PSR report  
2           having been prepared a long time ago. Had that sentencing  
3           gone forward the 60 days where additional victims could make a  
4           claim for restitution is also long past. So the likelihood of  
5           there being any significant additional victims making claims  
6           to restitution is very low.

7           So if we see that to the logical conclusion, at  
8           the end of a sentencing, even if the Court were to impose a  
9           fine of 500,000, the restitution as to the 14 people, wait the  
10          60 days and a couple of more people make their claim for  
11          restitution, the defendant is going to be getting a  
12          significant amount of money returned to him, but he will have  
13          been deprived of his right to counsel of choice at the very  
14          important stages of the proceeding.

15          And that's the problem that we have with this,  
16          your Honor. We do believe that it is, as a result, both a  
17          Fifth and Sixth Amendment violation.

18          I understand the Court's position that the *Luis*  
19          case applies pretrial, but I would submit to the Court that I  
20          don't believe it precludes -- or the analysis would be  
21          different for the period of time between the entry of a plea  
22          and prior to a sentencing.

23          He hasn't been convicted, but obviously it's not  
24          pretrial because he's waived his right to a trial, it's the  
25          period in between. And I still believe that the case law

1 would be applicable because we're dealing with untainted  
2 funds, and we're still dealing with the right to counsel for  
3 the very important stage of proceedings for both the potential  
4 motion to withdraw the guilty plea and a sentencing.

5 So I do believe that the analysis in the *Luis*  
6 case is still applicable, and I just fear that it would be  
7 error at this point when ultimately, at the end of the day,  
8 money is going to be returned to the defendant in all  
9 likelihood, for him not to be able to have his counsel of  
10 choice, and then, when it's too late, to get a check sent back  
11 to him from the district court clerk's office.

12 THE COURT: So the government represented that  
13 if it was 175,000 being sought just for attorney's fees, that  
14 that would be the equivalent at a payment of \$125 per hour of  
15 1400 hours of work by counsel. But you explained that it's  
16 actually only \$125,000 for attorney's fees.

17 MR. SCHONFELD: Yes, your Honor.

18 THE COURT: The other 50 is actually for costs.

19 MR. SCHONFELD: Yes, your Honor.

20 THE COURT: So that 125,000, at one twenty-five  
21 per hour would be how much?

22 MS. ROOHANI: One thousand hours.

23 MR. SCHONFELD: Your Honor, I know the Court is  
24 aware -- maybe not aware, but, your Honor, we do not do CJA  
25 panel appointed work so we don't do cases for \$125 an hour.

1 We do our share of pro bono cases, but this is not a case that  
2 we're accepting on a pro bono basis. So I think --

3 THE COURT: I'm not setting your fee, I just  
4 need to hear reasonableness evaluation --

5 MR. SCHONFELD: Yes, your Honor.

6 THE COURT: -- to see whether this is --

7 MR. SCHONFELD: You know, I get in state court  
8 they have --

9 THE COURT: -- or not just an attempt by  
10 Mr. Fuechtener to sort of claw back some money that otherwise  
11 would have been going to the victims under some kind of ruse  
12 that he's going to be using it for an attorney --

13 MR. SCHONFELD: Well, I can --

14 THE COURT: -- but could not reasonably be doing  
15 so.

16 MR. SCHONFELD: I can tell your Honor that if it  
17 is me and Mr. Chesnoff, the \$125,000 would be a flat fee  
18 engagement that would be earned upon receipt, and we would do  
19 the work that we are hired to do.

20 We would not be giving it to Mr. Fuechtener to  
21 spend as he pleases. The 50,000 would be maintained in our  
22 trust account, would be used for direct costs associated with  
23 those proceedings.

24 That being said, if the Court were to order that  
25 the money is released to us, Mr. Fuechtener could then say

1 that he wants to hire someone else, and obviously, you know,  
2 we would respect that, but then we wouldn't have control as  
3 to, you know, how the funds -- presumably we would transfer  
4 the funds to whomever he hires trust account, and whatever the  
5 court order that exists as a result of this hearing would go  
6 to that lawyer as well.

7 So if it is, you know, specific that it is only  
8 to be applied to, you know, A, B, and C, then that lawyer  
9 would have to comply with that order.

10 But if it is our firm, the one twenty-five would  
11 be earned upon receipt, and we would go to work to set out to  
12 do the things that we've described here, and so it would not  
13 be returned to Mr. Fuechtener.

14 The only caveat is what I just stated, that if  
15 he hired someone else, we would send it to their trust  
16 account.

17 THE COURT: All right. So if we're looking at  
18 1,000 hours at one twenty-five per hour, previously the  
19 government said that it would have been six months worth of  
20 time if it was 1400, but now we know it's 1,000 hours so --

21 MS. ROOHANI: I'm going to attempt to do the  
22 math, your Honor, if you give me just a moment.

23 THE COURT: All right. But that would include  
24 appeal you're saying.

25 MR. SCHONFELD: Yes, your Honor, it would.

1 THE COURT: All right. So it doesn't mean that  
2 you would be asking for a continuance of whatever time that --

3 MR. SCHONFELD: I would not be asking for a  
4 five- or six-month continuance. I would obviously request a  
5 continuance so that we could adequately prepare and be  
6 effective counsel, but it would not be a five- or six-month  
7 continuance that we would be seeking.

8 MS. ROOHANI: Your Honor, at a thousand hours,  
9 assuming that they worked 40 hours a week on this case alone,  
10 that would be 25 weeks worth of work. That's assuming eight  
11 hours a day. Mr. Smith's math assumed 175 days of legal work  
12 at eight hours day.

13 THE COURT: All right. So Mr. Fuechtener, are  
14 you able to follow everything that we're discussing here?

15 It sounds like Mr. Schonfeld and the  
16 government's attorney, Ms. Roohani, have been trying to figure  
17 out a way to assist you without jeopardizing the funds that  
18 are available for the victims.

19 And the smallest amount of money that I've heard  
20 so far is that \$125,000 is needed for Mr. Schonfeld to  
21 represent you, or some other attorney to represent you, with  
22 \$50,000 set aside for costs, for a total of \$175,000.

23 THE DEFENDANT: Yes, I understand that.

24 THE COURT: And do you understand that if I  
25 release that amount, the \$175,000, I do not put any strings on



1 that, you can use it to hire an attorney for 10,000, and pay  
2 the costs of a hundred and whatever else, but once I carve out  
3 this amount, you don't have to spend any of it if you don't  
4 want to, but I think that you need to be aware that you're not  
5 required to hire Mr. Schonfeld. You have that option, or you  
6 can hire someone else, or stay with Ms. Connolly or --

7 THE DEFENDANT: Yes, I know that. That's what  
8 Judge Hoffman explained to me in one of the past hearings.

9 MS. ROOHANI: Your Honor, I have one more  
10 concern that I need to put on the record.

11 THE COURT: Yes, Ms. Roohani.

12 MS. ROOHANI: Is that Mr. Chesnoff and Schonfeld  
13 will be the eighth and ninth attorneys on this case.

14 THE COURT: Yeah, we're going to run out of  
15 criminal defense attorneys in town.

16 MS. ROOHANI: He's running out of them, and  
17 you're a hundred percent correct, your Honor.

18 My concern is this, your Honor, is that if you  
19 give this money to him no strings attached, he's going to come  
20 back to you in two months after he's dissipated this \$175,000  
21 and say he needs another \$175,000 based on the Sixth  
22 Amendment. So I would ask that if you're going to release  
23 this money --

24 THE COURT: But that wouldn't be reasonable.  
25 That's what we're looking at here is what is a reasonable

1 amount of money that he would need to hire counsel.

2 MS. ROOHANI: And I would ask one of two things,  
3 your Honor, is if you determine that the total amount that's  
4 reasonable for any attorney is \$175,000, then let that be the  
5 total that he gets to spend regardless of whether he wants to  
6 hire this law firm or ten other attorneys or whatever it might  
7 be, because then that inters his Sixth Amendment right to  
8 counsel, and then the Circuit won't have an issue with it.

9 Alternatively, if it's the amount that --  
10 whatever the reasonableness amount is, then that work should  
11 have to be transferred over to the next set of attorneys  
12 ultimately if it comes down to that.

13 My concern is, is he's going to come back here  
14 in two months and ask for more money, and then two months  
15 after that and ask for more money, and then the victims are  
16 going to be left with zero dollars at the end of it.

17 And I don't think he has a right to the release  
18 of money just because he wants the money released. I think it  
19 has to be tethered to that Sixth Amendment right, and I would  
20 ask that the order be limited to his ability to pay for the  
21 motion to withdraw for the purposes of sentencing and only for  
22 attorney's fees and then costs.

23 THE COURT: Mr. Schonfeld, what is your position  
24 on that?

25 MR. SCHONFELD: Well, your Honor, my position is

1 that Mr. Chesnoff and I are unwilling to do the case unless we  
2 are being retained for the appeal, and I've stated the reasons  
3 for that.

4 I'm just not going to be committed to the  
5 District Court and the Court of Appeals and the defendant to  
6 pursue an appeal which would be my legal and ethical  
7 obligation if I'm not retained to do that.

8 So if that's going to be the order, then  
9 Mr. Fuechtener can set out to hire other counsel of choice  
10 with the funds that the Court releases, but we would be  
11 unwilling to have it limited to being retained for a potential  
12 motion to withdraw guilty plea and sentencing only.

13 THE COURT: All right. Ms. Roohani, I forgot to  
14 ask you, and I had written down here, that the defense has  
15 said that there's only 19 of the 93 victims who have requested  
16 notification, or is it the opposite, that they have requested  
17 not to be notified?

18 MS. ROOHANI: Your Honor, it's not an issue of  
19 the request not to be notified, is they might not be seeking  
20 restitution at this time.

21 As you know, they have to update their medical  
22 records as time goes on. Some of them may have opted out, but  
23 they could change their mind between now and the time of  
24 sentencing.

25 It's sort of one of these situations where I

1 know 92 have been identified, that means we know who they are,  
2 we know that we have contact information for them, we know  
3 that they're real human beings.

4 At some point in the past they've sought  
5 restitution so we have some type of contact information, and  
6 it's our office's practice to send out notification to all of  
7 those individuals unless they affirmatively opt out, and I  
8 don't have a number for you on that, your Honor.

9 I can tell you that as it's set forth in the PSR  
10 this is an unprecedented number of victims, and I know that  
11 they continue to trickle in.

12 So I understand that this case has been pending  
13 for some time, but it's been continued because Mr. Fuechtener  
14 wants to continue to litigate little things along the way, and  
15 as he does that, more victims continue to show up.

16 And so I'm not comfortable with limiting that in  
17 some way, as you can understand, because in the end, if he  
18 continues to litigate this until 2022 or whatever, there might  
19 be 92 victims who show up at that point, and that's a risk  
20 that he takes by continuing to push out sentencing.

21 And I'll just make clear, your Honor, because  
22 perhaps he doesn't understand this, is if they don't get the  
23 money from this plea agreement, they have indicated to me that  
24 they will come after him civilly.

25 So I don't think that this is a situation where

1 limiting this in some way is going to enure his benefit, and  
2 it's potentially going to harm him more long term.

3 THE COURT: Well, I think it bears repeating  
4 that in the plea agreement the \$5,000 per victim is actually  
5 very favorable to the defendant because, in fact, this is  
6 mandatory restitution that the Court does not have the  
7 discretion to deny, it has to impose restitution.

8 And what the statutes, the sentencing statutes  
9 provide for is that the Court provide restitution in the  
10 amount that is -- let me see if I can find this here -- well,  
11 Ms. Roohani, do you have -- I just saw this this weekend when  
12 I was looking at it again, but it's for all of the losses.

13 MS. ROOHANI: Correct, your Honor, all losses,  
14 physical, mental, emotional, psychological, that can be  
15 attributed to the defendant, and, as your Honor knows from  
16 looking at these in past cases there's --

17 THE COURT: Hundreds of thousands of dollars.

18 MS. ROOHANI: Per victim, yes, your Honor.

19 THE COURT: Per victim that is requested, much  
20 more than what you're looking at here.

21 So sometimes it's one of those  
22 be-careful-what-you-ask-for situations because this number is  
23 actually quite small compared to what we've had in other  
24 cases, and what could be seen if this agreement is undone.

25 But -- all right. So I do agree that the *Luis*

1 case does not apply to this particular situation inasmuch as  
2 it is not a pretrial case whereas *Luis* was a pretrial case.

3 These, are as much as my understanding, and I  
4 even looked at that because I wasn't really sure if these were  
5 tainted or untainted because there were upwards of, what, 8,  
6 9, 11 electrical devices at that home.

7 MS. ROOHANI: There was 9 with child  
8 pornography, 43 total devices, your Honor.

9 THE COURT: And there were also the zip drives  
10 and -- in closets and such, and there was not just child  
11 pornography, but also -- what is it, those listening devices  
12 that you plug into the electronics in order to live chat and  
13 view and -- almost seemed to me like perhaps it would be easy  
14 for the government, if they wanted to, make an argument that  
15 this property was tainted because there was so much child  
16 pornography being seen and requested and -- in this home.

17 There was explanations of parties, multiple  
18 parties going on. Again, I think that it's another situation,  
19 you need to be careful what you're asking for because I think  
20 that the government was being more than reasonable in agreeing  
21 that it's untainted and only asking for \$5,000 per victim.

22 As to the postconviction relief, the 2255 we  
23 know, because I write this all the time in the orders that the  
24 Court provides, there is no right to counsel in the 2255s.

25 And in the direct appeals, we do provide counsel

1 when someone is indigent and cannot afford counsel, but we  
2 certainly do not provide them with counsel of their choice,  
3 they don't get to pick and choose. We appoint their counsel  
4 for them.

5 The amount that's being requested for motion and  
6 sentencing would not be reasonable, quite frankly, but if you  
7 include the appeal, I think that the \$125,000 for attorney  
8 costs, plus \$50,000 for other costs, for example, forensic  
9 examinations of devices or private investigators to interview  
10 people, things of that nature, that amount does seem  
11 reasonable to me.

12 And, again, one twenty-five per hour is  
13 obviously not what most private practitioners in the criminal  
14 defense field charge. Usually it is a flat fee of a certain  
15 amount, and there's not even hours really that are kept except  
16 for any -- internally for any dispute reasons. But a case  
17 with this much discovery, that would be certainly reasonable  
18 at this point.

19 So I'm going to go ahead and release,  
20 Mr. Fuechtener, the \$125,000 for counsel and \$50,000 for  
21 costs, and they are to be used only for counsel and costs. So  
22 if you change your mind and you decide, as you have in the  
23 past, that this attorney, whether it's attorney number eight  
24 or nine or ten, or whatever, you decide now all of a sudden  
25 you don't want this one and you want another one, then you

1 can't come back and ask for more money. That's it.

2 We're not going to claw away at all of this  
3 money bit by bit, 125,000 at a time, every month coming in  
4 here asking for a new attorney.

5 Now, that being said, if you decide you don't  
6 want Schonfeld, you want Connolly instead, or you want to go  
7 back to Marchese, or you want someone else that I don't even  
8 know yet, you can use it for a different attorney, but you  
9 can't use it for anything else than an attorney, the one  
10 twenty-five, and same with the fifty, can only be used for  
11 costs for purposes of reviewing what needs to be reviewed and  
12 researching and drafting and arguing the motion and  
13 sentencing.

14 MR. SCHONFELD: Your Honor, just so that part of  
15 the motion is clear, there may be some experts for purposes of  
16 sentencing as well.

17 THE COURT: That's reasonable to expect as well,  
18 and that's included in the \$50,000.

19 MS. ROOHANI: Your Honor, does that amount also  
20 include appeal? Because I think that that is a defining --  
21 it's a question I'm sure that Mr. Schonfeld is going to want  
22 the answer to.

23 THE COURT: Yes, it does include the appeal.  
24 It's a flat fee, and so if that's what they're charging for  
25 the appeal, and that includes the appeal.



1 I don't think that there is a right to counsel  
2 of choice for the appeal, however, I am willing to provide the  
3 full amount that's requested at 125,000 for counsel and 50,000  
4 for costs, and that is to include appeal.

5 Like I said, otherwise I don't think that motion  
6 and sentencing -- 125,000 would not be reasonable for just the  
7 motion and sentencing, so that's why I am releasing that  
8 125,000 for counsel and fifty for costs because I agree that  
9 it would be a reasonable amount when you include appeal.

10 But I'm not certainly saying that in every case  
11 I'm going to be releasing funds for appeal because I really  
12 don't believe that there is a right to counsel of choice on a  
13 direct appeal. His is a package, I guess I should say, maybe  
14 sort of a unique situation with private counsel, but not  
15 uncommon in this district for private counsel to be retained  
16 at a flat fee naming services as a point as opposed to an  
17 hourly fee for amount of time.

18 So that being said, our current sentencing date,  
19 Aaron, is 23 --

20 MS. ROOHANI: It's in November, your Honor.

21 THE COURT: 14th. There is one stating  
22 November 14th. Can we keep that date, or are you going to --  
23 you don't have to tell me right now.

24 Are we going to be filing a stipulation to  
25 continue the date, and, if so, then, do you want me to rule on

1 the pending motion, or are you going to withdraw the motion?  
2 And you can think about this. I don't want to put you on --  
3 I'm just trying for my purposes because we have a couple of  
4 trials coming up, and I'm trying to figure out --

5 MR. SCHONFELD: Your Honor, I do not believe  
6 that whether it's my office representing Mr. Fuechtener or  
7 another attorney, that they would be prepared for sentencing  
8 on November 14th.

9 I also understand that it is Mr. Fuechtener's  
10 request that that date be continued so that he can secure his  
11 counsel of choice who can, you know, assess whether or not to  
12 file a motion to withdraw, supplement the motion to withdraw,  
13 address the issues that may need to be addressed, and then  
14 also potentially go forward with the sentencing.

15 So I think what I would propose, your Honor, is  
16 either leave that date as it is for now and have like a  
17 two-week status check for substitution of counsel.  
18 Mr. Fuechtener can by then make a decision whether it's going  
19 to be my office that's going to be representing him going  
20 forward or someone else representing him going forward.

21 I'm not sure what the Court wants to do as far  
22 as release of the funds, whether it would be maintained in my  
23 trust account until that election is made, or whether the  
24 Court just wants to maintain it still with the clerk's office  
25 until that election is made, and then it can go to whichever

1 attorney is taking on the representation.

2 But that would be my request, that we have a  
3 two-week window where the defendant can confirm who his  
4 counsel will be, and then at that point figure out scheduling  
5 for the sentencing.

6 THE COURT: All right. So motion 296, which is  
7 a motion for reconsideration regarding order 295, is, I guess,  
8 granted in part and denied in part because I am granting a  
9 release of some funds, although not all the funds, and I think  
10 that the order that was being requested to be reconsidered  
11 also addressed issues that we're not reconsidering.

12 So I'll just say that it's granted in part,  
13 denied in part, and the part that is granted is that \$125,000  
14 for counsel fees and \$50,000 for costs are to be released.

15 We'll go ahead and set a two-week status check  
16 and ask first to Mr. Fuechtener, along with whatever counsel  
17 he decides to use, to file something on the docket, some kind  
18 of notice to explain who it is that he wants the funds to be  
19 deposited with, so some kind of notice of appearance by  
20 counsel or notice of retention by counsel.

21 I don't need to know the details of the  
22 retention, but so long as there's something that's signed by  
23 Mr. Fuechtener that directs the moneys can go to some  
24 attorney's trust fund, whether it's this attorney or a  
25 different attorney.

1                   So while I'm agreeing to release the funds,  
2 they're not going to be released today, they're not going to  
3 be released until there's some notice on the record of who is  
4 being elected as counsel.

5                   If you file that today, then I'll release the  
6 money today. If you file it tomorrow, I'll release it  
7 tomorrow, but you have two weeks at the very least. If you  
8 need more time, ask for more time, and we'll give you more  
9 time, but I don't want to lose track of this.

10                  So you decide who you want. If you want  
11 Mr. Schonfeld, then a notice is filed that you sign saying I  
12 am electing to retain Mr. Schonfeld, I'm asking the Court go  
13 ahead and deposit the money in Mr. Schonfeld's account.

14                  If you decide to go with somebody else, same  
15 thing, I am electing to retain somebody else, tell me who it  
16 is, and that you want the funds to be deposited in the account  
17 of that person, and then the funds will be released to that  
18 person.

19                  MS. ROOHANI: And, your Honor, I'm attempting to  
20 figure this out because I'm actually out of the district in  
21 two weeks, and I have been having difficulties sometimes  
22 finding people to come and cover the hearings.

23                  So I spoke with Mr. Schonfeld, and he believes  
24 that this might be reasonable, is to have whoever that  
25 Mr. Fuechtener elects to represent him file a fee agreement or

1 something like that under seal with your Honor, and then  
2 you'll know for sure who's going to be representing him.

3 If it's Mr. Schonfeld, he can file that, and  
4 then the money can be released to him. If it's somebody else,  
5 then the money can be released to that law firm's trust  
6 account directly, and then we could potentially just vacate  
7 the hearing, because it would be clear to your Honor who  
8 ultimately would be representing him, and then we might not  
9 need to waste time coming back here again if your Honor is  
10 inclined to do that.

11 THE COURT: Right. But what if he doesn't --  
12 what if things get complicated as we know tend to happen in  
13 this case more often than not?

14 MS. ROOHANI: And, your Honor, and if that's the  
15 case, then I would just ask for three weeks because I'm  
16 actually not -- I would prefer to be here myself for these  
17 hearings, and unfortunately I'm out of the district on the  
18 23rd, and so I would ask that we set it for the week of the  
19 29th at any point.

20 THE COURT: All right. How about Tuesday, the  
21 30th?

22 MS. ROOHANI: I'm available all day, thank you,  
23 your Honor.

24 THE COURT: Aaron is that --

25 THE CLERK: That will be the second day of trial

1 your Honor.

2 THE COURT: Okay. I was going to say that  
3 doesn't look good so -- okay. Shall we go back? You won't be  
4 on the 26th -- well, the 26th is actually Nevada Day so some  
5 people are not going to be here because their kids will be out  
6 of school.

7 MS. ROOHANI: And, your Honor, I'm actually out  
8 of the district from the 21st of August -- August -- October,  
9 your Honor, until the 27th, so that whole week I'm out.

10 And, your Honor, if it's easier for that to  
11 work, I will make arrangements for somebody to be here. It's  
12 just my preference that I be here myself.

13 THE COURT: Well, Aaron, let's go ahead and --  
14 what time would a bathroom break be for the trial, like,  
15 10:30?

16 THE CLERK: Your Honor, I was actually going to  
17 recommend perhaps Thursday morning, September 1st --  
18 September -- November 1st at 9:00 a.m., and then that way we  
19 can have just a slightly later start time with trial.

20 THE COURT: Don't we have -- at 11:00 a.m. we  
21 have something, too?

22 THE CLERK: Those two I'm going to end up  
23 pushing to another date.

24 THE COURT: Oh, okay. All right. Then let's do  
25 that. Okay. How about Thursday, November 1st, at what time,

1 Aaron?

2 THE CLERK: 9:00 a.m., your Honor.

3 THE COURT: Okay. So is everyone available  
4 Thursday, November 1st, at 9:00 a.m.?

5 MR. SCHONFELD: Yes, your Honor.

6 MS. ROOHANI: Yes, your Honor.

7 THE COURT: We'll go ahead and plan to have a  
8 status check on that date which can be vacated if the  
9 appropriate documentation is filed prior to that date.

10 Mr. Schonfeld, do you have any objection to  
11 filing an fee agreement under seal? I wasn't going to ask for  
12 one, but --

13 MR. SCHONFELD: Your Honor, I spoke to my  
14 client, and he doesn't have an opposition to that.

15 THE COURT: Okay. So we'll go ahead and have a  
16 notice that is visible that is not sealed that has him  
17 electing who it is that he is retaining.

18 If he wants more than one person, obviously,  
19 they're just going to have to split the money more ways, and  
20 that he agrees that the money should be deposited in the  
21 account, the trust account for those folks and then everything  
22 else can be sealed.

23 MR. SCHONFELD: Thank you, your Honor.

24 THE COURT: Anything else, Ms. Roohani?

25 MS. ROOHANI: No, your Honor, thank you.

1                   And I will work together with whoever ultimately  
2 ends up getting on this case and trying to set a sentencing  
3 date that's reasonable.

4                   THE COURT: All right. Thank you.

5                   And so that means also that whoever it is that  
6 ends up on this case, whether it's the same folks or different  
7 folks, someone is going to need to file a stip to continue the  
8 sentencing date which is currently for November 14th, if, in  
9 fact, no one can be ready by the 14th.

10                  And then the motion -- let me see what I was  
11 looking at. The other motion that is still pending is -- do  
12 you have it, Aaron? I had it and --

13                  THE CLERK: Yes, your Honor, number 282 is the  
14 motion to withdraw plea, and number 283 is the motion to  
15 strike the motion to withdraw plea.

16                  THE COURT: All right. So motion 282 and 283  
17 are still currently scheduled to be heard on November 14th.  
18 So if you want to supplement it or withdraw it, you need to  
19 figure out what you're going to have to do.

20                  MR. SCHONFELD: Or presumably we could include  
21 that in the stipulation to continue the sentencing.

22                  THE COURT: That would be wise if you could do  
23 that.

24                  MS. ROOHANI: Will do, your Honor.

25                  THE COURT: All right.



1 MR. SCHONFELD: Thank you, your Honor.

2 MS. ROOHANI: Thank you, your Honor, for setting  
3 is this for hearing. We appreciate it.

4 THE COURT: All right, thank you, counsel.

5 -o0o-

6  
7 I certify that the foregoing is a correct  
8 transcript from the record of proceedings  
in the above-entitled matter.

9 /s/Margaret E. Griener 5/3/2019  
10 Margaret E. Griener, CCR #3, FCRR  
11 Official Reporter  
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